

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 4, 2007 Session

IN RE GAVEN R.

**Appeal from the Circuit Court for Rutherford County
No. 50675 Robert E. Corlew, Judge**

No. M2005-01868-COA-R3-CV - Filed on July 23, 2007

This appeal involves the custody rights of the biological parents of a six-month-old infant with multiple unexplained fractures. The Tennessee Department of Children's Services filed a petition in the Rutherford County Juvenile Court seeking to have the child declared dependent and neglected on the ground that he had been physically abused by his parents. Following a hearing, the juvenile court found that the child was dependent and neglected because of his parents' physical abuse and placed the child in the custody of the Department. The parents perfected an appeal to the Circuit Court for Rutherford County. After a three-day bench trial, the trial court determined that the child was dependent and neglected but explicitly declined to find that the parents had committed severe child abuse. Even though both the parents and the Department filed notices of appeal, only the Department has taken issue with the trial court's order. The Department insists that the record contains clear and convincing evidence substantiating its claim that the child's parents committed severe child abuse. We have carefully reviewed the record and have determined that the Department failed to prove by clear and convincing evidence that the biological parents committed severe child abuse.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, and Douglas Earl Dimond, Senior Counsel, for the appellant, Tennessee Department of Children's Services.

Jeff McCullough, Murfreesboro, Tennessee, Guardian Ad Litem.

Brad W. Hornsby and Jonathan L. Miley, Murfreesboro, Tennessee, for the appellee, William R.

Monisa J., Not Represented on Appeal.

OPINION

I.

William R. and Monisa J. met during their freshman year of college. Monisa J. discovered that she was pregnant after they had been dating for three to four months. The child was not planned. Despite the fact that the child would complicate their educational and career plans, Monisa J. and William R. decided to raise the child together and to eventually marry.¹

Monisa J. became emotional during the later stages of her pregnancy. She and William R. broke up in December 2002. Gaven R. was born on February 7, 2003 by cesarean section. Monisa J. and William R. were both nineteen years old at the time. They reunited after William R. asked Monisa J. to live with him. Monisa J. and Gaven R. moved into William R.'s apartment in May or June 2003. Family members and several friends helped take care of Gaven R. because both parents were either working or seeking employment.

Like most other young parents, Monisa J. and William R. began to settle into a routine after they began living together. Monisa J. assumed most of the homemaking and parenting responsibilities. William R. helped care for Gaven R., but the child seemed more comfortable with his mother. The couple and their son generally spent each weekend with William R.'s parents in Jackson, Tennessee where they would attend William R.'s father's church. William R.'s family members noticed that they were very protective of Gaven R.

Monisa J. was attentive to Gaven R.'s medical needs during the first months of his life. Between February 14, 2003 and August 12, 2003, Monisa J. took Gaven R. to the Centennial Pediatrics office in Murfreesboro on eleven occasions for check-ups, evaluations, and shots. While Gaven R. was described as "colicky" or "fussy," there was no indication of any serious illness or injury prior to the August 12, 2003 visit. As far as the record shows, none of the personnel at Centennial Pediatrics ever noted bruises on Gaven R. or that he appeared to be in discomfort or pain.

The life of these young parents and their son changed dramatically in mid-August 2003. By that time, William R. had gone to work for a bank in Murfreesboro. William R., Monisa J. and Gaven R. spent the August 8-10, 2003 weekend in Jackson with William R.'s parents. During that time, they took Gaven R. to the emergency room in Jackson because he had a fever. According to the parents, nothing remarkable occurred on Monday, August 11, 2003. William R. testified that when he came home from work, he played with Gaven R. by "holding him by his arms and trying to do a little walking motion with him." He also stated that his son was "excited" and "giggling."

After Monisa J. put Gaven R. to bed, she and William R. also retired for the night. Monisa J. testified that Gaven R. awoke screaming three times during the night. She checked on him each time but did not pick him up. After deciding that Gaven R. was teething, Monisa J. gave him children's Tylenol and rubbed his back until he closed his eyes. The parents overslept the next morning and were rushed when they awoke. William R. dressed for work, and Monisa J. got herself and their son ready to drive William R. to work. She placed Gaven R. in his car seat without

¹ As far as this record shows, William R. and Monisa J. have not yet married.

incident and drove William R. to work. When she returned home and began preparing to give Gaven R. his bath, she noticed that he “wasn’t moving his right arm at all.” When she touched Gaven R.’s arm, he “scream[ed] like he was in pain.”

Monisa J. became panicky and called William R. at work. She told him that she was taking Gaven R. to the emergency room. William R. told her that he would go with her to the hospital and asked her to pick him up from work. After talking with William R., Monisa J. telephoned Centennial Pediatrics and was instructed to bring the child there rather than to the emergency room. Accordingly, Monisa J. and William R. drove Gaven R. to Centennial Pediatrics. A licensed practical nurse and a physician examined Gaven R. but observed no bruising or other external signs of injury. A physician instructed Monisa J. and William R. to take Gaven R. to the Imaging Center of Murfreesboro for x-rays.

Monisa J. and William R. took Gaven R. to the Imaging Center and then returned to Centennial Pediatrics with the x-rays and the radiologist’s report showing that Gaven R. had an “acute right humerus² mid-shaft diaphyseal fracture” that was no more than five days old. When asked to explain how Gaven R. had been injured, both Monisa J. and William R. stated that they were unaware of any incident or event that could have resulted in their son’s broken arm. The staff at Centennial Pediatrics notified the Department of Children’s Services (“Department”) after Monisa J. and William R. were unable to explain how Gaven R.’s arm had been broken.

Later in the afternoon, Murfreesboro Police Detective Jennifer West and Kim Littlejohn of the Department arrived at Centennial Pediatrics to interview Monisa J. and William R. They told the parents they were following standard procedure when a child has a broken bone. Ms. Littlejohn interviewed the parents separately in a physician’s office. Monisa J. stated that she was unsure how Gaven R. had been injured but speculated that he could have rolled over on his arm while he was sleeping or that he might have gotten it stuck in the crib. She also told Ms. Littlejohn and Detective West that she believed that Gaven R. was fragile and that she was concerned about his growth and the fact that he was not yet sitting up. She also insisted that neither she nor William R. had ever gotten angry or harmed the child. During his interview, William R. told Ms. Littlejohn and Detective West that he had never seen Monisa J. get mad at or strike Gaven R. William R. stated that he was unable to take care of Gaven R. by himself and that Monisa J. was their son’s primary care giver. William R. likewise could not explain how his son had been injured.

Following the interviews, William R. and Monisa J. were instructed to take Gaven R. to Vanderbilt University Medical Center to have a cast put on his arm. The parents drove their son directly to Vanderbilt’s emergency room. Gaven R. was eventually examined by Dr. Christopher Greeley, a pediatrician specializing in newborn medicine and child maltreatment who serves as the Director of Child Abuse and Neglect Program at Vanderbilt Hospital. After taking another x-ray, Dr. Greeley confirmed that Gaven R. had a hairline fracture of his right arm but assured the parents that they had no reason to be concerned about the injury. He also informed Monisa J. and William R. that it was a standard policy to perform a full body x-ray when a child has unexplained fractures.

²The humerus is the long upper arm bone that runs from the shoulder to the elbow. 2 Roscoe N. Gray, *Attorneys’ Textbook of Medicine* ¶ 5A.00 (2000) (“Attorneys’ Textbook of Medicine”).

Later, Dr. Greeley informed Monisa J. and William R. that the x-rays had revealed that Gaven R. had between nineteen and twenty-two fractures. Both parents expressed disbelief at the x-ray findings, so Dr. Greeley went over the x-rays with them to point out where the fractures had occurred. Neither Monisa J. nor William R. were able to explain how any of these fractures occurred and eventually expressed their desire to go home with their child. Dr. Greeley informed them that they would not be permitted to leave the hospital with Gaven R. and that he was obligated to report these injuries to the authorities. William R. provided Dr. Greeley with Detective West's and Ms. Littlejohn's business cards.

Monisa J. and William R. spent the night with Gaven R. in the emergency room under the watchful eye of the Vanderbilt staff. Detective West and Ms. Littlejohn arrived at the hospital on the morning of August 14, 2003. Monisa J. broke down when they informed her that a court in Rutherford County had ordered that Gaven R. be removed from their home and placed in the temporary custody of the Department. William R. began to panic when he realized that they were suspected of harming Gaven R.

Ms. Littlejohn and Detective West informed Monisa J. and William R. that they desired to inspect their apartment in Murfreesboro. Accordingly, the parents drove back to Murfreesboro and permitted Ms. Littlejohn and Detective West to inspect their apartment. Ms. Littlejohn and Detective West observed that the apartment was well-kept, and they found no evidence of drug use. After inspecting the apartment, the authorities requested the parents to accompany them to the police station for further questioning. Both Monisa J. and William R. continued to insist that neither of them had harmed Gaven R. and that they were unaware of any incident that could have caused the injuries revealed by the x-rays that had been taken at Vanderbilt.

On August 13, 2003, the Department filed a petition in the Rutherford County Juvenile Court seeking temporary custody of Gaven R. on the ground that he was the victim of severe child abuse. After being awarded temporary custody, the Department placed the child in a foster home and established a schedule of supervised visitations for Monisa J. and William R. The juvenile court was prepared to conduct a hearing on the Department's dependent and neglected petition in November 2003 but continued the matter after learning that criminal charges were filed against William R. The juvenile court heard the matter on September 8, 2004 and ruled from the bench that Gaven R. was a dependent and neglected child because he was the victim of severe child abuse committed by his parents. The juvenile court also suspended all contact between William R. and Monisa J. and Gaven R.³ The juvenile court entered its judgment on October 15, 2003. Both Monisa J. and William R. appealed the juvenile court's decision to the Circuit Court for Rutherford County.⁴

Monisa J. and William R. moved to Jackson to live with William R.'s parents shortly after the entry of the juvenile court's order. Monisa J. began working at William R.'s father's church, and William R. returned to college in January 2005. On February 2, 2005, they filed a joint motion seeking visitation with Gaven R. Five days later, the Department filed a proposed permanency plan

³William R. and Monisa J. have had no contact with Gaven R. since September 2004.

⁴The record contains only Monisa J.'s notice of appeal. William R., however, participated fully in all the proceedings in the trial court without objection. Thus, we presume that his notice of appeal was inadvertently omitted from the record by oversight of the trial court clerk.

stating that its goal was to make Gaven R. available for adoption based on the juvenile court's finding of severe child abuse. Both parents objected to the permanency plan.⁵

The trial court conducted a bench trial from April 27 through April 29, 2005. The Department presented no direct evidence that either Monisa J. or William R. had abused Gaven R. or that either of the parents had ever acted violently or was inclined to violent or aggressive conduct. It did present testimony that Monisa J. and William R. were upset at various times during their interrogations on August 12 and 13, 2003 and that William R.'s supervised visitations with Gaven R. had not gone well.

The centerpiece of the Department's case was the deposition testimony of Dr. Greeley. Dr. Greeley testified that he could not determine who had abused Gaven R. However, he opined that "[t]he most logical explanation [for Gaven R.'s injuries] was that he has suffered repeated episodes of trauma over a period of time, most likely consistent with two months, at least two episodes and it appears more likely to be more than that." By a process of elimination, Dr. Greeley ruled out the possibility that the fractures could have been caused by accident or that they were the result of any underlying medical condition that would have rendered Gaven R.'s bones brittle. Dr. Greeley concluded his testimony by observing:

If we look at the United States and look at all child abuse and neglect, the number one perpetrator is mother. The problem is the number one care taker is mother because most fathers absolve themselves of their responsibility. If we look at physical abuse, specifically not neglect or sexual abuse and just physical abuse, the most common perpetrator in physical abuse is the mother, the father or both. Those three criteria account for 75 percent of all physical abuse. The single most common perpetrator is a father, followed very closely, if not equally, behind by a maternal boyfriend.

The Department also presented the deposition testimony of Dr. George Tiller, a clinical geneticist at Vanderbilt Hospital, who testified that Gaven R.'s fractures were not caused by osteogenesis imperfecta or any other genetically based condition. Dr. Tiller stated that there was no physiologic basis for Gaven R.'s multiple fractures and that "[a] six-month-old child could not cause injuries to himself. And since there was no history of motor vehicle accident, trauma, falling down the stairs, that sort of thing, the only explanation is that this is non-accidental trauma."

Monisa J. and William R. presented the testimony of parents, family members, and friends who described them as attentive parents. These witnesses portrayed the parents as a typical young couple who had been juggling raising a baby with their educations and careers. They also testified that neither parent had ever manifested aggressiveness or hostility and that they had never seen bruises on Gaven R. or observed him acting as if he was in great pain.

⁵On June 1, 2005, the Department filed a motion seeking a hearing on its proposed permanency plan. The trial court never acted on this motion. Apparently it conducted a hearing on June 11, 2005 and remanded the matter to the juvenile court at William R.'s request. This record contains no indication regarding what action, if any, the juvenile court took with regard to the permanency plan.

The parents' principal defense consisted of the deposition testimony of three physicians who offered explanations for Gaven R.'s fractures other than physical abuse. Their chief witness was Dr. Marvin E. Miller, a professor of pediatrics and obstetrics and gynecology at Wright State University School of Medicine, who is board certified in clinical genetics and biochemical and molecular genetics. Dr. Miller stated that Gaven R.'s bones did not develop normally during the gestation period because his fetal movement had been restricted as a result of the abnormality of his mother's uterus. He explained that "decreased fetal movement leads to decreased fetal bone loading, leads to an increased likelihood that these infants in the first year of life could . . . [have] fractures with forces that might not otherwise cause them."

Two other physicians agreed with Dr. Miller that fetal immobilization could cause low bone strength which, in turn, could make a child susceptible to fractures. Dr. Charles J. Hyman, a board certified pediatrician and professor of pediatrics at Loma Linda University School of Medicine, testified that his conclusion was the same as Dr. Miller's. He stated that Gaven R.

suffered insufficiency fractures due to increased bone fragility most likely associated with decreased bone density and almost certainly associated with abnormal microarchitecture which was due to intrauterine fetal constraint that was associated with the mother's uterine abnormality that caused the decreased fetal movement, decreased bone loading, and that it was transient, because once the child was allowed movement, that the bone could be loaded properly.

Dr. Hyman also observed that normal, repeated handling by caretakers could cause fractures similar to Gaven R.'s and that

[i]t's inconceivable to me, absolutely inconceivable to me that you can get 22 fractures or 19 or 17, depending on how you count, and assume that this is a violent act, which is the way that most people will talk about the mechanism of these injuries, and not have head trauma, central nervous system problems, bleeding, retinal hemorrhages, intrathoracic trauma, intraabdominal trauma, some - - as well as the skin.

The other physician was Dr. Michael Parfitt, a part-time professor of medicine at the University of Arkansas for Medical Sciences. Dr. Parfitt, who has worked in the field of calcium and bone metabolism for many years, testified that, like Dr. Miller, he had concluded that "the development of the bones is contingent upon them being used by muscular activity that causes slight deformation of the bones which is sensed by cells in the bone called osteocytes. And a normal amount of muscular activity is necessary for the bones to develop normally." Dr. Parfitt also testified that "if fractures occur in a child in which there is . . . no external evidence of injury, that the fractures most likely result because there's something wrong with the bones."

On July 22, 2005, the trial court filed a final order apparently drafted by the lawyer for the Department. The order is internally inconsistent. The court states clearly that it concluded that Gaven R. was dependent and neglected; however, its order is far less clear regarding the basis for

this conclusion. At one point, the order states that the finding of dependency and neglect is based “on the grounds alleged in the Petition by clear and convincing evidence.”⁶ However, later in the order, the trial court states that “the child has not suffered from severe child abuse as defined by Tenn. Code Ann. § 37-1-102(b)(21) by clear and convincing evidence.” After reviewing the order in light of the evidence, we have concluded that the trial court found that Gaven R. had been abused,⁷ but not severely abused⁸ by one or both of his parents.

Both the Department and the parents filed notices of appeal from the trial court’s July 22, 2005 order. The appeal thereafter bogged down because of problems with the record on appeal and uncertainty regarding the parents’ representation on appeal. The Department’s brief was eventually filed in February 2006; however, neither parent filed a brief because the lawyers who had represented them at trial no longer represented them.⁹ In March 2006, the parents sent a letter to this court stating that they had “not [been] able to file a brief at this moment due to the lack of legal representation.” They also stated that they were attempting to retain lawyers, and they asked that their letter be considered a “postponing mechanism or an extension or [sic] some sort.” In September 2006, after neither parent had filed a brief, this court notified the parties that the case would be submitted on the record and the Department’s brief and argument.

The case was set for oral argument on January 9, 2007. While the guardian ad litem and counsel for the Department were present, neither the parents nor lawyers for the parents appeared. Because of the uncertainty regarding whether the parents had been informed of their rights to appointed counsel, this court entered an order on January 11, 2007, remanding the case to the trial court with directions to determine whether either or both parents were indigent and whether they desired appointed counsel to represent them on appeal. The trial court determined that William R. was indigent and appointed counsel to represent him on appeal. The trial court did not appoint a lawyer for Monisa J. because she insisted that she was not indigent and that she would be able to retain a lawyer using funds inherited from her mother.

William R.’s counsel filed a brief on April 23, 2007. However, Monisa J. did not retain another lawyer and did not file a brief. Following two notices, this court set the case for oral

⁶The grounds alleged in the petition were severe child abuse.

⁷“Abuse” provides grounds for finding a child to be dependent and neglected. Tenn. Code Ann. § 37-1-102(b)(12)(G) (2005). Abuse exists when a child “is suffering from, has sustained, or may be in immediate danger of suffering from or sustaining a wound, injury, disability or physical or mental condition caused by brutality, neglect or other actions or inactions by a parent, relative, guardian, or caretaker.” Tenn. Code Ann. § 37-1-102(b)(1).

⁸Severe abuse is also grounds for finding a child to be dependent and neglected. Tenn. Code Ann. § 37-1-102(b)(12)(G); *State v. M.S.*, No. M2003-01670-COA-R3-CV, 2005 WL 549141, at *9-11 (Tenn. Ct. App. March 8, 2005), *perm. app. denied* (Tenn. Aug. 29, 2005). “Severe abuse” is defined in Tenn. Code Ann. § 37-1-102(b)(21). We need not belabor the differences between abuse and severe child abuse because William R. has not challenged the trial court’s dependent and neglect finding.

⁹Apparently the parents and their lawyers parted ways soon after the entry of the July 22, 2005 order because another lawyer filed their joint notice of appeal. This court later permitted the lawyer who filed the notice of appeal to withdraw from the case.

argument on June 4, 2007. Counsel for the Department and William R., as well as the guardian ad litem appeared and participated; however, neither Monisa J. nor a lawyer representing her appeared.

The only issue before us is the issue raised by the Department – whether the trial court erred by failing to find that William R. and Monisa J. committed severe child abuse. Even though both William R. and Monisa J. filed notices of appeal, they have not taken issue with any aspect of the trial court’s ruling, including the trial court’s finding that Gaven R. is dependent and neglected. Monisa J. failed to file a brief. William R. filed a brief but did not take issue with the finding that Gaven R. was dependent and neglected. Accordingly, the parents have waived their opportunity to take issue with the trial court’s finding that Gaven R. is a dependent and neglected child.

II.

The outcome of this case hinges on the weight of the Department’s evidence that either Monisa J. or William R. or both of them severely abused Gaven R. The Department and the guardian ad litem insist that the testimony of Drs. Greeley and Tiller provide clear and convincing evidence that Gaven R. was severely abused by either or both of his parents. William R. disagrees and insists that the trial court properly found that neither he nor Monisa J. had severely abused Gaven R.¹⁰ We have determined that the Department’s evidence, as a whole, falls short of establishing by clear and convincing evidence that either William R. or Monisa J. severely abused Gaven R.

A.

Dependent and neglect proceedings may potentially cause serious disruptions to the parent-child relationship. Children who are found to be dependent and neglected are frequently removed from their parents’s custody and placed in the custody of the Department. If the parents’ conduct that precipitated the dependent and neglect proceeding is sufficiently serious, a finding of dependency and neglect may be the foundation for a proceeding to terminate the parents’ parental rights. Because of the potential impact on the constitutionally protected parent-child relationship, Tenn. Code Ann. § 37-1-129(c) (2005) requires that persons seeking to have a child declared dependent and neglected must prove all the elements of their case by clear and convincing evidence. *State v. M.S.*, 2005 WL 549141, at *10. This heightened burden of proof minimizes the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998).

Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, *State Dep’t of Children’s Servs. v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. Aug. 13, 2003) (No Tenn. R. App. P. 11 application), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002); *In re C.D.B.*, 37 S.W.3d 925, 927 (Tenn. Ct. App. 2000). It produces in a fact-finder’s mind a firm belief or

¹⁰ William R.’s chief argument on appeal is that the Department’s evidence does not exclude the possibility that the fracture to Gaven R.’s right arm could have been caused by someone else when he was not in the immediate physical custody of his parents.

conviction regarding the truth of the facts sought to be established. *In re A.D.A.*, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002); *Ray v. Ray*, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001); *In re C.W.W.*, 37 S.W.3d at 474.

The “clear and convincing evidence” burden of proof required by Tenn. Code Ann. § 37-1-129(c) requires the reviewing courts to distinguish between the specific facts found by the trial court and the combined weight of those facts. See *In re Tiffany B.*, ___ S.W.3d ___, ___, 2007 WL 595369, at *6 (Tenn. Ct. App. 2007); *In re R.M.S.*, No. M2005-01979-COA-R3-PT, 2006 WL 3827322, at *24 (Tenn. Ct. App. Dec. 28, 2006) *perm. app. denied* (Tenn. Mar. 5, 2007); *In re Audrey S.*, 182 S.W.3d 838, 861 n. 26 (Tenn. Ct. App. 2005). Accordingly, using the standard of review in Tenn. R. App. P. 13(d), we must first determine whether the facts found by the trial court are supported by a preponderance of the evidence. *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006). Then we must determine whether the facts, either as found by the trial court or as supported by a preponderance of the evidence, clearly and convincingly establish all the elements required to declare that a child is dependent and neglected. See *In re Giorgianna H.*, 205 S.W.3d 508, 516 (Tenn. Ct. App. 2006); *State Dep’t of Children’s Servs. v. A.M.H.*, 198 S.W.3d 757, 762 (Tenn. Ct. App. 2006). A trial court’s specific findings of fact are entitled to a presumption of correctness under Tenn. R. App. P. 13(d) unless the preponderance of the evidence is otherwise. However, a trial court’s conclusion that clear and convincing evidence has been presented warranting a determination that a child is dependent and neglected is not entitled to a presumption of correctness. *In re Tiffany B.*, ___ S.W.3d at ___, 2007 WL 595369, at *6.

B.

The Department’s case against William R. and Monisa J. rests on two central propositions. The first proposition is that Gaven R. was in his parents’ exclusive custody for five days preceding August 12, 2003. The second proposition, based on the testimony of Drs. Greeley and Tiller, is that a diagnosis of non-accidental trauma (abuse) is appropriate in the absence of evidence regarding how Gaven R.’s fractures occurred. If the record contained only this evidence, it could very well produce a firm conviction in a fact-finder’s mind that William R. or Monisa J. or both abused¹¹ or even severely abused¹² Gaven R. However, the record contains other evidence. Specifically, Drs. Miller, Hyman, and Parfitt provided an explanation regarding how Gaven R.’s fractures could have occurred in the absence of abuse or severe abuse by his parents.

The guardian ad litem, but not the Department, challenged the admissibility of Dr. Miller’s testimony prior to trial and renewed his objections during the trial. The guardian ad litem requested the court to exercise its gatekeeping prerogative to exclude Dr. Miller’s opinions because they (1) would not substantially assist the trier-of-fact, (2) lack trustworthiness, and (3) are not generally accepted in the medical community. The trial court declined to exclude Dr. Miller’s or the parents’

¹¹Gaven R. could be considered “abused” if he sustained injuries caused by brutality, neglect or other actions or inactions of his parents. See Tenn. Code Ann. § 37-1-102(b)(1). This definition is broad enough to include inappropriate handling of a child without an intent to injure.

¹²Gaven R. could be considered to be “severely abused” if either or both of his parents knowingly used force on Gaven that was likely to cause great bodily harm or death or if either or both of his parents knowingly exposed him to or failed to protect him from such injury. See Tenn. Code Ann. § 37-1-102(b)(21)(A).

other experts' testimony stating that it would be able to determine the weight that should be given to the evidence.¹³

The cumulative effect of the testimony of Drs. Miller, Hyman, and Parfitt is to provide an explanation for Gaven R.'s fractures other than physical abuse by his parents. Pointing to an undisputed abnormality in Monisa J.'s uterus,¹⁴ these physicians opined that Gaven R.'s fractures were the result of increased bone fragility caused by intrauterine fetal constraint.¹⁵ The trial court did not exclude the testimony of Drs. Miller, Hyman, and Parfitt. Rather, it appeared to give less weight to their opinions because their "theories . . . are not advanced in the medical community" and because Drs. Greeley and Tiller "are from Vanderbilt Medical Center, and the reputation of Vanderbilt Medical Center has great respect throughout the medical profession."

We need not defer to the trial court's decision regarding the relative weight of the deposition testimony presented by the physicians in this case. *Bryant v. Baptist Health Sys. Home Care of E. Tenn.*, 213 S.W.3d 743, 750 (Tenn. 2006) (holding that appellate courts draw their own conclusions regarding the weight and credibility of expert testimony presented by deposition); *Estate of Fetterman ex rel. Fetterman v. King*, 206 S.W.3d 436, 445 (Tenn. Ct. App. 2006) (same). The trial court did not exclude the testimony of Drs. Miller, Hyman, and Parfitt, and we find no basis in the record to exclude it now.¹⁶

We decline to discount the testimony of Drs. Miller, Hyman, and Parfitt simply because it is not the prevailing view among mainstream pediatricians and pediatric radiologists. In light of their testimony, we have determined that the Department has failed to eliminate reasonably substantial doubt regarding the correctness of Dr. Greeley's and Dr. Tiller's conclusion that Gaven R.'s fractures could only have been caused by non-accidental trauma or abuse by his parents.

¹³We note that the trial court acted on an assumption that its gatekeeping function differed depending on whether the proceeding was a jury trial or a bench trial. The court stated that it would use different standards for witnesses testifying in jury trials than it would for witnesses testifying in bench trials. The court also stated that it was better able than a jury to determine the weight of expert testimony and that it would have excluded Dr. Miller's testimony had this case been tried to a jury. Nothing in this opinion should be construed as approving this reasoning. We decline to address its correctness here because neither the Department nor the guardian ad litem have taken issue on appeal with the trial court's decision to admit Dr. Miller's testimony.

¹⁴Standard texts describe the uterus as "a hollow, thick-walled, fibro-muscular organ that is suspended in the middle of the pelvis by fascial and ligamentous attachments. . . . During the years of ovarian hormonal activity, the uterus measures 8 to 9 centimeters in length, 5 to 6 centimeters at the widest portion and 4 centimeters in thickness The uterine cavity is conical, with a volume of approximately 4 cubic centimeters (milliliters)." 17 *Attorneys' Textbook of Medicine* ¶ 290.01. Rather than having a uterus shaped like an inverted pear and a single uterine cavity, Monisa J.'s uterus is heart-shaped and contains two "noncommunicating" uterine cavities separated by a septum. The baby was gestating in the larger right uterine horn which did not communicate with the left uterine or the vaginal canal.

¹⁵Dr. Miller stated that Gaven R.'s movement in Monisa J.'s uterus was constrained not only because of the anatomical abnormality of her uterus but also because she was relatively small and because this was her first pregnancy. Monisa J. is approximately five feet tall, and her pre-pregnancy weight was approximately 115 pounds.

¹⁶This record does not contain sufficient evidence to enable this court, or any other court for that matter, to resolve the current dispute between the traditional majority view of pediatricians and pediatric radiologists and the newer views of bone scientists and other pediatricians with regard to the possible causes of unexplained fractures in infants.

III.

The trial court's conclusion in its July 22, 2005 order that Gaven R. had not been severely abused by either William R. or Monisa J. is affirmed, and the case is remanded to the trial court for whatever further proceedings may be required. The costs of this appeal are taxed to the Tennessee Department of Children's Services.

WILLIAM C. KOCH, JR., P.J., M.S.